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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PINAL COUNTY, a political subdivision of the State of Arizona, Plaintiff/Appellee, v. AIRE H. DeJONG, a married man, and MILKY WAY DAIRY, an L.L.C., Defendants/Appellants.	2 CA-CV 2007-0149 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200601033

Honorable William J. O'Neil, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 As the result of an open outdoor fire that burned for over three months at the dairy facility owned and operated by appellants Aire DeJong and Milky Way Dairy, appellee Pinal County filed a complaint to recover civil penalties for violation of county air quality control regulations and state statutes. DeJong and Milky Way appeal from the default judgment entered against them and from the trial court's subsequent denial of their motion to set aside that judgment. They argue that, because the letter DeJong wrote and mailed to the court was sufficient to constitute a responsive pleading, the court had no authority to enter a default judgment in the first instance and should have set the judgment aside. For the following reasons, we affirm the judgment.

¶2 On appeal, we construe the evidence in the light most favorable to sustaining the judgment. *Terry v. Gaslight Square Assocs*., 182 Ariz. 365, 368, 897 P.2d 667, 670 (App. 1994); *see also Beyerle Sand & Gravel, Inc. v. Martinez*, 118 Ariz. 60, 62, 574 P.2d 853, 855 (App. 1977) (on review of denial of motion to set aside default, facts viewed in light most favorable to prevailing party). On May 3, 2006, a staff member of the Pinal County Air Quality Control District visited the dairy and "observed a large pile of cotton gin trash burning."[1] At that time, and over the next two days, District staff members observed "that no active measures were being made by [appellants] to extinguish the fire."

¶3 Between May 3 and May 5, District staff instructed appellants that they must undertake active measures to extinguish the fire and make significant progress by May 5.

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[1]Cotton gin "trash," a by-product of cotton, is commonly used to feed dairy cattle.

Presumably because no such progress had been made, the County sent them a notice of violation on May 5. In the notice, the County informed appellants they needed a permit to maintain an open fire and that they had thirty days to demonstrate they had not violated county air regulations. The District also offered to meet with appellants "to discuss the violations and corrective actions." Appellants did not contact the District within thirty days.

¶4 In late June 2006, Pinal County filed a complaint to recover civil penalties from DeJong and Milky Way for violating county air quality regulations adopted pursuant to A.R.S. §§ 49-479 and 49-480. *See* A.R.S. § 49-502(B) (in face of violation of article, county can file complaint to recover civil penalties of up to ten thousand dollars a day); *accord* A.R.S. § 49-513(A). Specifically, the County alleged they had unlawfully "ignite[d], cause[d] to be ignited, permit[ted] to be ignited, or suffer[ed], allow[ed] or maintain[ed] any open outdoor fire." A.R.S. § 49-501(A). It also alleged that appellants had failed to acquire the necessary permits to allow open burning.

¶5 As the County took the above efforts to secure appellants' response to the fire, the fire continued to burn and ultimately burned for 104 days before extinguishing itself. The County served Milky Way with the complaint on July 6, 2006, by delivering it to the corporation's statutory agent, an attorney.[2]

[2]The County individually served DeJong by publication, which was completed in October 2006. Following that service, DeJong did not attempt to file any correspondence with the court.

¶6 DeJong alleges he responded to that complaint by mailing a letter to the clerk of Pinal County Superior Court in late July 2006. If the clerk received that letter, she did not file it. DeJong also "provided a copy of [the] letter" to the attorney for the County. DeJong claims he mailed the letter to the clerk's office again on August 11, 2006, this time with the filing fee. Although the record demonstrates that the clerk's office cashed the check for the $191 filing fee, no letter was ever filed if such a letter was ever received.

¶7 On November 16, 2006, the county filed an application for entry of default against DeJong and Milky Way on the ground they had "failed to plead or otherwise defend th[e] action." *See* Ariz. R. Civ. P. 55(a). The clerk filed the entry of default the same day, giving DeJong and Milky Way notice of their failure to file an answer and a ten-day opportunity in which to file one before the default was effective. *See* Ariz. R. Civ. P. 55(a)(1), (3). After a hearing at which DeJong testified, the court granted the County relief and entered a default judgment against DeJong and Milky Way, ordering them to pay $104,000 in penalties, $1,000 a day for the 104 days the fire had burned, and court costs of $356.74.

¶8 Appellants moved to set aside the judgment on the grounds that it is void because the court never had the authority to enter it, the amount was too great to be determined by default, and their failure to answer was excusable. The court denied the motion in a thorough minute entry, implicitly concluding the judgment was not void and that

DeJong and Milky Way had not shown excusable neglect in their failure to file an answer.[3] Because Milky Way's "statutory agent is an attorney who promptly forwarded the complaint to the Dairy," the court concluded that "DeJong as owner of the dairy made a calculated decision . . . [to] proceed[] without an attorney." The court further stated,

> He received due notice on each procedure, commencing with the service of the summons and complaint and followed by the Motion for the Entry of Default Judgment and Hearing. He was given ample opportunity to respond formally to the motion but elected not to. He requested orally that the hearing be continued to grant him additional time to prepare for the argument and it was extended to him. He appeared and argued the motion and his argument was not persuasive. . . . That he chose to do other matters rather than pay attention to this case is not just cause for the setting aside of the judgment.

This appeal followed.

VOID JUDGMENT

¶9 DeJong argues the default judgment against him is void.[4] He contends because he filed an answer to the County's complaint, the court had no authority to enter a default. If a judgment is void because a court had no "jurisdiction to render the particular judgment or order entered," *In re Adoption of Hadrath*, 121 Ariz. 606, 608, 592 P.2d 1262, 1264

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[3]The court also arguably found they had not shown a meritorious defense to the charges in the complaint.

[4]Although Milky Way does not appear to argue the court lacked jurisdiction to enter the default against it, we note, in any event, "a corporation cannot appear in court by an officer who is not a lawyer and cannot appear *in propria persona*." *Boydston v. Strole Dev. Co.*, 193 Ariz. 47, ¶ 6, 969 P.2d 653, 655 (1998). Thus, even were we to construe DeJong's mailing the letter as filing an answer, it could only constitute an answer on his own behalf and not on behalf of the corporation.

(1979), the trial court has no discretion but must vacate the judgment, *Martin v. Martin*, 182 Ariz. 11, 14, 893 P.2d 11, 14 (App. 1994). And whether a judgment is void is a question of law we review de novo. *In re Estate of De Escandon*, 215 Ariz. 247, ¶ 7, 159 P.3d 557, 559 (App. 2007).

¶10 To support his argument, DeJong primarily relies on *Whitlock v. Boyer*, 77 Ariz. 334, 337, 271 P.2d 484, 487 (1954). In that case, our supreme court held, without further discussion, that the trial court had no authority to enter a default because a responsive pleading had been filed. *Id.* The court did not, however, discuss the requirements for the contents of a responsive pleading or its filing. *Id.* Here, the trial court found the letter had not been filed by the clerk "and presumably, if delivered to the Clerk, was not recognized as a pleading but rather correspondence." The court found no filing fee had been paid at the time DeJong claimed he submitted the letter, and that the court file contained a letter dated July 24, 2006, from the clerk of the court to DeJong, informing him he had "fees due of $191." It concluded that even if the content of the letter—attached to the motion to set aside the judgment—was accurate, "it was not and cannot be construed to be an answer."

¶11 DeJong concedes the clerk "most likely refused to file the letter because it was not in pleading form." However, he then argues the letter was sufficient to constitute an answer because in it he "directly and concisely denied that DeJong and Milky Way ignited

the fire, alleged that the fire was the result of spontaneous combustion and explained DeJong and Milky Way's efforts in putting out the smouldering fire."[5]

¶12 DeJong emphasizes that when he mailed the letter, he was acting as a pro se litigant, relying on the federal law principle that parties representing themselves be given more latitude than attorneys in drafting pleadings. *See, e.g., Lazarescu v. Ariz. State Univ.*, 230 F.R.D. 596, 599 (D. Ariz. 2005). We acknowledge that in general, procedural rules should not be used to avoid litigating a case on its merits. *See, e.g., Encinas v. Pompa*, 189 Ariz. 157, 160, 939 P.2d 435, 438 (App. 1997). But Arizona state courts have long held that pro se litigants are "entitled to no more consideration than if they had been represented by counsel," and are held to the same standard as attorneys as far as "familiarity with required procedures and the same notice of statutes and local rules." *Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963); *accord Ackerman v. S. Ariz. Bank & Trust Co.*, 39 Ariz. 484, 486, 7 P.2d 944, 944 (1932); *Higgins v. Higgins*, 194 Ariz. 266, 270, 981 P.2d 134, 138 (App. 1999); *Copper State Bank v. Saggio*, 139 Ariz. 438, 441, 679 P.2d 84, 87 (App. 1983).

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[5]The letter states, in relevant part, that the fire "was ignited by spontaneous combustion," that the local volunteer fire department had determined "the best way to extinguish the fire was to reduce the pile and spread the material onto an adjacent field," that "[s]everal attempts were made to relocate the [burning material] and each time it created more fire and smoke," and thus, "it was determined to let the smoldering fire (smoke only) burn itself out." DeJong concluded the letter by stating it was his opinion as the owner of Milky Way "that, based on the equipment available to us, we did everything within our means to extinguish the fire."

¶13 DeJong's letter did not comprehensively respond to the allegations set forth in the complaint. *See* Ariz. R. Civ. P. 8(b) (answer shall set forth party's defenses to each claim and admit or deny each allegation in complaint; "[d]enials shall fairly meet the substance of the averments denied"); *cf. Fairfield v. W.J. Corbett Hardware Co.*, 25 Ariz. 199, 205-06, 215 P. 510, 512 (1923) (in case decided before Rule 8(b) was promulgated, answer that failed to specifically deny allegations of complaint was insufficient to raise fact issue). For example, the letter did not address the allegations he had failed to contact the District about a settlement conference, had failed to obtain a "valid open burning permit," and had failed to obtain an "industrial permit."

¶14 But even if we were to construe DeJong's letter as a sufficient response to the complaint, the trial court did not err when it concluded DeJong had never filed the letter. *See* Ariz. R. Civ. P. 12(a)(1) ("A defendant shall serve and file an answer."); Ariz. R. Civ. P. 5(h) ("The filing of pleadings and other papers with the court as required by these Rules shall be made by filing them with the clerk of the court . . . ."). Although there was some evidence that DeJong mailed the letter to the court, DeJong presents no evidence that the clerk's office ever filed it if they received it. To the contrary, DeJong concedes the clerk did not file the letter.

¶15 At the default hearing, the court asked DeJong if he had filed an answer. He responded, "Well, I was asked to write a letter, Your Honor, and I wrote a letter. And I know that they received the letter because I wrote a $191 check with it. I don't know exactly what

the response is supposed to be, but they asked me to write a letter and I wrote a letter." In response to the court's further statement that it did not "see any Answer that's in the file," DeJong stated he "didn't know there was supposed to be anything other than the letter that I was writing." When the court admonished DeJong that ignorance of the rules was not a valid reason for failing to file an answer, DeJong stated,

> Well, I don't know where to look it up. They asked me to write a letter in answer to their letter, and I wrote a letter in answer to their letter. The fire was accidental. It wasn't even accidental actually, it was—you know, it just happened. We didn't light the thing, you know. We're not guilty of anything. We had a fire that we weren't able to put out and that's what I wrote in the letter and that's the last time I heard from anybody.

¶16 Notably, the trial court found DeJong's statements—that he sent the letter with a filing fee in August and that he was told by someone in the clerk's office that a letter would be sufficient as a responsive pleading—"unreliable." Because the trial court is in the best position "to determine credibility and weight" of the witnesses and the evidence, we must defer to the court's resolution of such matters. *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 302, 681 P.2d 390, 454 (App. 1983). For the foregoing reasons, we conclude the court did not abuse its discretion when it found that DeJong had failed to file an answer. Therefore, the trial court had jurisdiction to enter the default judgment against both DeJong and Milky Way.

MOTION TO SET ASIDE

¶17 In the alternative, DeJong and Milky Way argue the trial court abused its discretion by denying their motion to set aside the judgment under Rule 60(c), Ariz. R. Civ. P. In support, they contend that they were "vigorously defending" themselves, that their failure to file an answer was excusable, and that the trial court failed to consider all the factors in A.R.S. § 49-513 before imposing the penalty.[6]

¶18 We review a trial court's denial of a motion to set aside a default judgment for an abuse of discretion. *DeHoney v. Hernandez*, 122 Ariz. 367, 371, 595 P.2d 159, 163 (1979); *see Campbell v. Frazer Constr. Co.*, 105 Ariz. 40, 41-42, 459 P.2d 300, 301-02 (1969) (trial judge in "much better position" than appellate court to determine whether default judgment should be set aside). To be entitled to relief from default judgments, parties must establish three factors: (1) the failure to answer was excusable neglect, (2) they promptly sought relief, and (3) they had a meritorious defense to the action. *Baker Int'l Assocs., Inc. v. Shanwick Int'l Corp.*, 174 Ariz. 580, 583, 851 P.2d 1379, 1382 (App. 1993).

¶19 The trial court here implicitly concluded the failure to answer had not been excusable neglect.[7]

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[6]Although DeJong and Milky Way argue in their opening brief that "Milky Way was deprived [of] the opportunity to seek counsel," they made no such argument to the trial court. They have appropriately withdrawn the argument from our consideration on appeal in their reply brief.

[7]Because the trial court did not abuse its discretion by so concluding, we need not address whether DeJong and Milky Way sought relief promptly or had a meritorious defense

> Neglecting to answer a properly served complaint is "excusable" when the neglect or inadvertence is such as might be the act of a reasonably prudent person under similar circumstances, or when it involves a clerical error which might be made by a reasonably prudent person who attempted to handle the matter in a prompt and diligent fashion.

Beal v. State Farm Mut. Auto. Ins. Co., 151 Ariz. 514, 518, 729 P.2d 318, 322 (App. 1986). Appellants emphasize that they mailed the letter, paid the filing fee, and attended the default hearing—and that those actions demonstrated reasonable prudence.

¶20 But the trial court found, *inter alia*, that DeJong and Milky Way had made a "calculated decision" to proceed without an attorney, and that even after the County moved for entry of default, they were "given ample opportunity to respond formally to the motion but elected not to." *See Beyerle Sand & Gravel*, 118 Ariz. at 62, 574 P.2d at 855 (carelessness of corporation in failure to retain an attorney to answer complaint not excusable neglect); *Counterman v. Counterman*, 6 Ariz. App. 454, 457-58, 433 P.2d 307, 310-11 (1967) (not having attorney is not sufficient to show excusable neglect); *see also Daou v. Harris*, 139 Ariz. 353, 359-60, 678 P.2d 934, 940-41 (1984) (trial court did not abuse discretion in failing to set aside default judgment for excusable neglect when defendant knew of suit but "simply did not give the service of process the consideration ordinarily prudent persons would give"). We find no abuse of discretion in the court's determination that

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to the action. *See Baker Int'l Assocs.*, 174 Ariz. at 585, 851 P.2d at 1384 (affirming trial court's decision that defendant had not established excusable neglect and declining to address other factors).

DeJong and Milky Way had not shown excusable neglect in their failure to plead or defend the action sufficient to set aside the default judgment.

¶21 Finally, appellants contend the trial court erred when it failed to address all the factors set forth in § 49-513 before entering the default judgment. That statute provides that a court "shall consider all" enumerated factors when "determining the amount of a civil penalty under this section." § 49-513(C). The factors include the severity and history of the violation, the economic impact of the violation and any resulting penalties, the duration of the violation, and any other factors the court finds relevant. *Id.* In its ruling on the motion to set aside the judgment the court stated in relevant part that DeJong and Milky Way had not "submit[ted] any meaningful argument regarding the penalties," that they "did nothing" in response to the County's efforts to settle the matter, and that they similarly "responded by doing nothing" after the County notified them they needed a permit or to otherwise take actions to ameliorate the violations. The court also stated that the penalties would have been much greater "if other aggravating factors had existed."

¶22 DeJong and Milky Way have cited no authority for the proposition the court was required to expressly set forth its consideration of the factors enumerated in § 49-513(C). *See Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992) ("Implied in every judgment, in addition to the express findings made by the court, are any additional findings necessary to sustain the judgment, if reasonably supported by the evidence and not in conflict with the express findings."). And the court's findings in its

minute entry ruling support the presumption the court considered all the factors before entering the default judgment. *See Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002) ("Trial judges are presumed to know the law and to apply it in making their decisions.").

¶23 Finding no error, we affirm the default judgment.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge